U.S. Department of Labor

Office of Administrative Law Judges
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Issue Date: 11 April 2003

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In the Matter of

STEPHEN W. DALE
Complainant

v.

STEP 1 STAIRWORKS
5-0460-02-009-923896
Respondent
.....

Case No. 2002-STA-00030

Before: Stuart A. Levin
Administrative Law Judge

For: Complainant:
Diana Brodman Summers, Esq.

For Step 1 Stairworks:
Gary Lambes, Jr., President

Decision and Order

This proceeding arises pursuant to the Surface Transportation Assistance Act of 1982 (STAA), as amended, 49 U.S.C. § 31105, *et. seq*. and the regulations promulgated and published at 29 CFR Part 1978.100 to implement the Act. Stephen W. Dale, a truck driver formerly employed by Step 1 Stairworks, Inc., of Hinckley, Illinois, filed a complaint alleging that he was the target of retaliation and a discriminatory personnel action when was fired by Step 1 management allegedly for engaging in safety-related activities protected by the Act.

Respondent, Step 1, denies these allegations. It maintains it fired Dale because he failed to report for work, exhibited a poor attitude, and used foul language around the shop. Following an investigation, OSHA found that Dale did indeed engage in protected activity, but concluded that; "The preponderance of evidence does not show that respondent violated Section 31105 of the STAA." Accordingly, OSHA dismissed his complaint, and Dale requested a hearing which convened in Chicago, Illinois, on September 25, 2002. Following the hearing, the parties were afforded time to file briefs, but Complainant, alone, took advantage of the opportunity. The findings and conclusions which follow are based upon a careful review of the record evidence in light of the argument of the parties and the applicable case law.

Findings of Fact

The record shows that Stephen W. Dale, a resident of Hinckley, Illinois, was hired as a truck driver by Step 1 Stairworks to deliver stair parts to various job sites around northeastern Illinois. Tr. 23-24. Dale holds an Illinois Class C driver's license which authorizes him to drive any vehicle with a gross weight under 26,001 pounds. Tr. 23. In addition to his duties as a driver, Dale was expected to perform various chores around the shop when he was not on a delivery run. Tr. 24. He had limited woodworking experience prior to joining Step1, and he was given some woodworking training on the sander which allowed him to make balusters. *See,* Tr. 58-59, Tr. 67-68; Tr. 95. For the most part, however, he performed menial tasks shop tasks cleaning up around the shop and assisting other shop workers. Tr. 24-25; Tr. 41. Tr. 25; Tr. 59; Tr. 66. Doug Regnier is Step 1's shop manager and was Dale's supervisor. Tr. 90. Dale testified that he usually delivered materials to building sites where the roads were often unpaved roads and nails, staples, and other types of debris usually were strewn about the path. Tr. 25-26.

Step 1 Stairworks manufactures and installs hardwood stair components for residential and commercial applications. Tr. 64. It operates eleven trucks ranging from mini-vans to a box truck. Tr. 65. Step 1 assigned the box truck, a Ford F-550 cab truck, to Dale. Tr. 26. This vehicle is approximately 18-20 feet long with a gross weight of approximately 19,000 pounds. Tr. 26. Step 1 workers who did not hold Class C licenses occasionally drove the box truck. See. Tr. 111.

The box truck Dale drove passed inspection in December of 2001; however, Dale testified that the inspector noted that the overhead clearance lights were not operational and he advised Dale to repair them. The inspector did not, however, write-up his concern. Tr. 26; Tr. 45-46. Step 1's president, Gary Lambes, disputed Dale's contention. He testified that the truck had no overhead clearance lights, only reflectors, and while the reflector lens were missing, they never housed bulbs. Tr. 69-70. Dale insisted, however, that they did indeed contain bulbs. Tr. 62. In a letter to OSHA, Lambes states "there are lights on the roof." Tr. 74. A vehicle inspection report dated March 3, 2002, also noted that the clearance lamps were missing, and Lambes confirmed that these were the same lamps Dale complained about. Tr. 74-75. CX. 5.

The record shows that in the second week of December, 2001, Dale was on delivery run when the front left, driver side, tire sprung a leak. Tr. 27. At the time, he was able to limp into the parking lot of a Home Depot where, after purchasing some needed equipment, he changed the tire. Tr. 27; Tr. 68. When he returned to the shop, he informed Lambes that right front tire was also unsafe, and he could "feel a slight vibration" indicating an alignment problem that should be fixed. Tr. 27; Tr. 46; Tr. 51-52; Tr. 56; Tr. 69. Dale testified that he considered the worn tire and the slight vibration safety risks and a problem under federal safety regulations. Tr. 53. Lambes agreed to repair the truck, Tr. 28; Tr. 70-71, but subsequently drove it, and concluded that it did not need repairs. Tr. 71.

By the first week in January, 2002, the truck, according to Dale, had still not been repaired. Tr. 28. The Employer, however, introduced repair bills purporting to show a tire repair was completed on January 2, 2002. Ex. 1; Tr. 48. On January 11, 2002, Dale was assigned a two hundred mile delivery trip to Wadsworth, Illinois, and when he returned, his supervisor, Doug Regnier, assigned him a turn-around run back to Wadsworth. Tr. 28; Tr. 59. Dale testified that the materials were not ready at 3:30 P.M. and he was concerned that the Wadsworth job site, unpaved and unlighted, would be unsafe in the dark especially without a spare tire. Tr. 28. He also objected because the second trip to Wadsworth would have required him to log a 17-hour day in violation of "federal trucking laws." Tr. 29; Tr. 59-60. Accordingly, he declined to take that assignment. Tr. 60-61.

Dale testified that when the truck was not repaired by January 13, 2002, he called the DeKalb County Sheriff's Department to report the truck's defects. DeKalb

County, in turn, referred the complaint to the Hinckley police who dispatched an officer in response. Tr. 29-30. At the scene, the officer who received the call filed a report. In his opinion, the "front tire...appears to be in need of replacement." CX. 1; Tr. 30. At the time the officer looked at the truck, it was parked on Step 1's property and Lambes would later object that permission had not been obtained for anyone to be on the premises. Tr. 44.

On January 14, Dale again complained to Lambes about the need for repairs, Tr. 31-32, and this time, Dale testified, Lambes "became angry" and told him he had driven the truck and found nothing wrong with it. Tr. 32. Lambes acknowledged, however, that he was not a mechanic and does not have a Class C driver's license. Tr. 65.

On January 17, 2002, despite his earlier objections, Lambes advised Dale that the truck was scheduled for repairs two days later. It was not, however, sent in for the work. Tr. 32; Tr. 71. Nor was it fixed when Dale arrived at work on January 21, Tr. 32, because Lambes had again concluded that it did not need repairs. Tr. 71. As a result, Dale delivered a written letter addressed to Lambes advising him that he would not be reporting to work on January 21, would be contacting OSHA, and would refuse to drive the truck until it was repaired. After delivering the letter, Dale went home. CX. 2; Tr. 33; Tr. 57.

Dale testified that as of the time he left work on January 21, there was no work for him around the shop, Tr. 33; Tr. 57-58, however, the record shows that shop work, such as cleaning the floors, and removing wood chunks and chips, is "always" available. Tr. 91. Dale never requested alternative work in lieu of driving the truck. Tr. 94. The next day, January 22, Dale called in sick at 5:30 A.M. Tr. 34; Tr. 72. By calling, Dale followed the appropriate procedure. Tr. 72-73.

Dale returned to the shop on January 23, 2002, reported to his supervisor, Regnier, and went to the baluster work station. Tr. 35. Shortly thereafter, Lambes arrived and told Dale to leave the premises. Tr. 73; Tr. 90. According to Dale, Lambes also told him; "You will be getting a letter from me. " Tr. 35. Dale, however, never received a letter of termination from Step 1. Tr. 35-36; Tr. 73. The record shows that Lambes consulted with Regnier before he terminated Dale, but Lambes did not seek, and Regnier did not offer, a recommendation concerning the termination. Tr. 100-101.

Lambes testified that Dale was fired for creating divisions within the workplace and instigative behavior among his co-workers, denigrating the company, his bad attitude and work ethic, and his foul language. Tr. 75-77; Tr. 79. Lambes regarded Dale's attitude problems as "very serious." He and Regnier testified that Dale's divisive behavior included complaints to co-workers about trivial matters involving the company and about his assignments, Tr. 78-80;Tr. 84, continuously griping and making comments denigrating the company and "belittling" management to everyone including the high school help. Tr. 81; Tr. 84; Tr. 92; Tr. 95; Tr. 101. Step 1, however, maintained no personnel records documenting any concerns about Dale's attitude, performance, or interaction with co-workers or supervisors. Tr. 77; *See also*, Tr. 96-97; Tr. 103; EX 6. According to his supervisor, however, Dale would grow angry on occasion and "scream" about an assignment. Tr. 99-100. A co-worker testified that Dale was lazy, Tr. 113, and his frequent negative comments, complaints, cursing, and bad attitude made it difficult and frustrating to work with him. Tr. 104-107.

At the time of his termination, Dale had worked at Step 1 a total of ninety-three days. Tr. 38. He denied that he had a bad attitude about his work and denied that his cursing or foul language was any worse than others in the shop. Tr. 36; Tr. 49. Lambes acknowledged that there was no company policy governing the use of foul language, Tr. 87, but he testified that foul language is not common in his shop, Tr. 83; Tr. 88, but neither was it absent. Tr. 102; Tr. 110. Dale acknowledged that Lambes once cautioned him about his language, Tr. 68; Tr. 81-82, and although Lambes and Dale's supervisor were aware of other instances of Dale cursing, Tr. 83, *See also,* Tr. 97-98, Dale was never disciplined. Tr. 37; Tr. 49-50.

The record shows that Dale is now employed, but he was out of work for five and a half months after his termination. He earned $12.75 per hour, 40 hours per week at Step 1, and his new job pays $11.00. Tr. 37-38.

Discussion

Section 49 U.S.C. §31105 of the Surface Transportation Assistance Act of 1982, as amended, provides, in part:

> (1) A person may not discharge an employee, or discipline or discriminate against an employee regarding pay, terms, or privileges of employment, because

(A) the employee, or another person at the employee's request, has filed a complaint or begun a proceeding related to a violation of a commercial motor vehicle safety regulation, standard, or order, or has testified or will testify in such a proceeding; or
(B) the employee refuses to operate a vehicle because
(i) the operation violates a regulation, standard, or order of the United States related to commercial motor vehicle safety or health; or
(ii) the employee has a reasonable apprehension of serious injury to the employee or the public because of the vehicle's unsafe condition.

(2) Under paragraph (1)(B)(ii) of this subsection, an employee's apprehension of serious injury is reasonable only if a reasonable individual in the circumstances then confronting the employee would conclude that the unsafe condition establishes a real danger of accident, injury, or serious impairment to health. To qualify for protection, the employee must have sought from the employer, and been unable to obtain, correction of the unsafe condition. See, Fountain v. P&T Container Services, 1999 STAA 9 (ARB, Nov. 30, 1999).

Dale alleged that, as a consequence of his protected activity, Step 1 fired him. Step 1 argued at the hearing that Dale's complaints about the truck were unfounded, but it does not dispute that he expressed concerns to Step 1 management about safety-related repairs he thought the truck needed, including tire, alignment, and overhead clearance lighting, and that he refused to drive it pending completion of the repair work. Whether or not Step 1 management agreed with concerns he expressed about the vehicle's safety, Dale's communications to them constituted protected activities under the Act.

Protected Activities

A brief summary of Dale's covered communications provides a context for later analysis. Dale advised Lambes sometime during the second week of December, 2001, after experiencing a flat tire, that he detected a front-end vibration and noticed that the truck's right front tire was worn. Now, it is well settled that the type of report Dale provided Lambes constitutes protected activity. Indeed, Lambes agreed to repair the defects Dale identified, but after driving the truck himself, he decided that repairs were unnecessary. Dale continued to drive the truck but remained concerned that the defects had not been addressed. His repeated inquires and complaints to management about the lack of repairs were protected under the Act.

Thereafter, on January 13, 2002, Dale reported his concerns to the DeKalb County Sheriff's Department and the Hinckley police. While Step 1 objects that the police failed to obtain permission before entering upon its property to look at the vehicle, Dale's communications to the authorities was, nevertheless, protected activity. Furthermore, he was covered when he provided safety-related information to the authorities he reasonably believed had jurisdiction to ensure truck safety on the roads of Illinois, and he was covered by the "reasonable apprehension of injury" circumstances, or Subsection (B)(ii), when he subsequently refused to drive a truck he considered unsafe. Hadley v. Southeast Cooperative Services Co., 86 STA 24 (Sec. June 28, 1991); Duff Truck Line, Inc. v. Brock, No. 87- 3324 (6th Cir. 1988) (LEXIS, Genfed Library, Court of Appeals file), aff'g Robinson v. Duff Truck Line, Inc., Case No. 86-STA3, Sec. Final Dec. and Order, Mar. 6, 1987; LeBlanc v. Fogleman Truck Lines, Inc., Case No. 89-STA-8, (Sec. Dec. 20, 1989), aff'd, No. 90-4114 (5th Cir. Apr. 17, 1991); Gohman v. Polar Express, Inc., 88 STA 14 (Sec. Nov. 14, 1988). Moreover, his refusal to operate a vehicle he reasonably believed could be driven only in violation of federal safety regulations was encompassed within the purview of Subsection (B)(i). Wilson v. Bolin Associates, Inc., 91 STA 4 (Sec. Dec. 30, 1991).

Since each of his reports and communications constituted protected activity, it would not, under applicable decisions of the Administrative Review Board, be particularly useful at this point to analyze whether Dale has established a *prima facie* case. *See*, Frechin v. Yellow Freight Systems, 96 STA 24 (ARB, Jan. 13, 1998); Andreae v. Dry Ice, Inc., 95 STA 24 (ARB, July 17, 1997); Etchason v.

Carry Companies of Illinios, Inc. 92 STA 12 (Sec., March 20, 1995). It should suffice simply to observe that Step 1management not only was fully aware of Dale's protected activity, but adverse personnel actions were taken against him in temporal proximity to his protected activity sufficiently close to give rise to an inference of causation. Ertel v. Giroux Brothers Transportation, Inc., 88 STA 24 (Sec. Feb. 15, 1989), at 15; Stone & Webster Engineering, Inc. v. Herman, 115 F.3d 1568 (11th Cir. 1997); Mandreger v. Detroit Edison Co., 88 ERA 17 (Sec. March 30, 1994); Crosier v. Portland General Electric Co. 91 ERA 2 (Sec. 1994); Samodov v. General Physics Corp., 89 ERA 20 (Sec. 1993). Accordingly, the critical inquiry is whether retaliatory animus motivated the decision to fire him. Frechin v. Yellow Freight, *supra*.

Before turning to the Employer's motives, I should comment on its concern that, despite Dale's complaints, the truck was not actually defective. Even if the Employer were correct, and there is persuasive evidence in this record that it was not, its argument would, nevertheless, miss the mark. Nothing in the language of the Act conveys any congressional intent to restrict its coverage only to those concerns which address actual violations or imminently hazardous conditions. In deference to the policy objectives of the STA and similar enactments, the precedents which guide this adjudication have not required the ultimate substantiation of the employee's concerns. Passaic Valley Sewage Comm'rs. v. Dept. Of Labor, 992 F.2d 474 (3rd Cir., 1993); Yellow Freight Sys., Inc. v. Martin, 954 F.2d 353 (6th Cir., 1992); Oliver v. Hydro-Vac Services, Inc., 91 SWD 1 (Sec. 11/1/95); Aurich v. Consolidated Edison Co., 86 ERA 2 (Sec. Order, 4/23/87). It is sufficient that a complainant have a "reasonable belief" or a "good faith perception," that a potential violation has occurred or might occur or a potentially hazardous situation may exist. Passaic Valley, supra; Minard v. Nerco Delamar Co., 92 SWD 1 (Sec., 1/25/94); Yellow Freight, supra; Oliver, supra; Aurich, supra. Thus, the courts have specifically protected the disclosure of a "possible violation" even when a subsequent investigation revealed the employee was mistaken. Kansas Gas & Electric Co. v. Brock, 780 F.2d 1505 (10th Cir., 1985), cert. denied, 478 U.S. 1011 (1986); Mackowiak v. University Nuclear Sys., Inc., 735 F.2d 1159 (9th Cir., 1984). In this instance, however, Dale's concerns were not only reasonable, there is corroborating evidence in the record that Dale's safety complaints about the truck were justified.

Dual Motive for Adverse Action
A.
Employee's Bad Attitude

While the Employer has proffered several grounds for discharging Dale, the totality of evidence demonstrates that his complaints about the safety of the box truck, and his ultimate refusal to drive it, were, at least in part, factors motivating the Employer's decision to let him go. There can be no denial that Dale was not a model employee. He griped a lot, used coarse language, on occasion denigrated the company and its management, and was generally regarded as exhibiting a bad attitude. Nevertheless, while his overall misbehavior was described as "serious" by Lambes, it never rose to a level which management deemed sufficient to warrant any discipline or written personnel action of any type. To the contrary, the record shows that while Dale rarely asked for work, with one exception, he completed his assigned tasks in a satisfactory manner. He admitted he refused to make a return run to Wadsworth, but that instance involved excessive hours of operation and other safety issues triggering the protections of the Act.

At the hearing, the Employer portrayed Dale as a complainer, grousing about assignments, bending the ear of his co-workers, and generally critical of management. It is well settled, however, that the protections afforded by the whistleblower provisions of the Surface Transportation Act are not singularly reserved for the employee with an unblemished work record. They are available to the workforce generally, including the below average employee who occasionally displeases his boss. Indeed, the courts have been extremely wary of subjective criticisms when leveled against an employee who has recently engaged in protected activity. (*See*, Passaic Valley, *supra* at 481.). Thus, Step 1 convinced me at the hearing that Dale was not about receive its Employee of the Month award, but the type of gripes he voiced are commonplace in a workforce; and Step1 management has not revealed itself as so thin-skinned that Dale's attitude and negativity would have spurred it to fire him absent his complaints about the problems with the truck.

B.
Employee's Bad Language

There is no serious dispute in this record that Dale cursed in the workplace, occasionally peppering his speech with four-letter words, drawing unfavorable attention to himself, and an admonition from his boss. Indeed, after one distasteful

episode, Lambes spoke to him about his use of foul language. Nevertheless, Dale found himself, thereafter, unable fully to comply; but it is also true that his cursing was more in the nature of shop talk, the persiflage of the work site, rather than angry confrontational invective directed at his supervisors or company officials, and the distinction is significant.

Unlike the situation in Mitchell v. Link Trucking Co., 2000 STA 0039 (May 9, 2001), Dale's foul utterances did not assail management authority. While Mitchell confronted individuals, verbally assaulting and obscenely gesturing company officials, Dale tended to curse circumstances. Moreover, both Lambes and Regnier were aware that others cursed in the shop area and at job sites, Dale more so than most, but none were terminated; and I am persuaded that his language would not have gotten him fired absent his protected activity.

Under these circumstances, I find applicable the pronouncement of the Secretary as articulated in Kenneway v. Matlack, Inc., 88 STA 20 (Sec. June 15, 1989), a precedent which recognizes that foul language considered in the context of the raw realities of a workplace like a building site or a work shop is neither unusual nor generally a cause for termination. Essentially, the case law indicates that, absent a showing that an employer imposes a strict language code and enforces it uniformly, it may find it difficult to justify the termination of a protected employee simply for using bad language when similar language by other workers is overlooked or addressed in a less drastic fashion.

C.
Leaving the Workplace

As previously mentioned, when Dale reported to work on January 21, 2002, and the truck still had not been repaired, he advised Lambes, by letter, that he would refuse to drive the truck until it was repaired. Dale went further, however, and declared; "I am not reporting to work this date, January 21, 2002." CX. 2. The record shows that he hand-delivered the letter and went home. Dale testified that he left work because there was no shop work available at the time. This testimony is not credible.

The letter Dale delivered was a detailed four page, carefully drafted, typewritten document. He obviously devoted considerable time to its preparation, and it is equally obvious that he had decided, before he delivered it that if the truck

was not repaired, he was not going to report for duty regardless of the availability of shop work. The letter itself plainly contradicts the contention that he went home after he determined that there was no shop work. The course of action he elected to pursue was decided before he left his home.

Nor did Dale, contrary to his testimony, seek any shop work from his supervisor before he left for the day. Regnier testified, without contradiction, that work of the type Dale performed, tasks such as sweeping up sawdust and wood chips, making balusters, and the like was always available. Had Dale approached him, he testified, he would have put him to work on January 21. Indeed, Lambes explained that, although Dale was not expected to drive the truck if he had a problem with it, Step 1 needed help around the shop, and Dale simply walked off the job, leaving him "high and dry." Tr. 123. Thus, Lambes testified that Dale did not approach him or Regnier, but simple delivered the note and left, and that, according to Lambes, was; "The bottom line...the straw that broke the camel's back." Tr. 121.

2.
Employer Response

Ordinarily, an Employer is free to deal with time and attendance problems as it sees fit, and it may apply its policies to protected workers as long it does so on a non-discriminatory basis. See, Vanadore v. Oak Ridge National Laboratories, 92 CAA 2, 93 CAA 1 (6/7/93). The Act does not contemplate bureaucratic second-guessing of an employer's uniformly applied, non-discriminatory personnel practices no matter how harsh they may seem.

In this instance, it appears that Dale's un-excused absence on January 21, was the only blemish on his time and attendance record. Nevertheless, we accept the notion that Step 1 is free to adopt whatever personnel policies it deems in its interest, no matter how draconian they may seem, including terminations based upon a single instance of absenteeism. The focus here is limited to ensuring that a protected worker is not the singular target of a personnel practice invoked in retribution because the worker engaged in activities encouraged by the Act.

In the context of the reasons Step 1 advanced for its decision to fire Dale, it is a matter of interest, but not really significant, that it failed to demonstrate either the existence of a policy or an actual personnel history documenting a past practice of terminating any other employee for a single un-excused absence. More importantly,

Step 1's time and attendance practices are not really relevant here. To the contrary, the record shows that Dale was not terminated for his actions on January 21. His presence or absence at the job site on January 21 made no difference at all. In his capacity as Step 1's representative at the hearing, Lambes candidly acknowledged that; "The termination of Stephen Dale was in the works before that letter ever hit my desk, and that is the truth." Tr. 123. Dale's fate was decided before the January 21 letter was delivered.

But For the Protected Activity Dale Would Not Have Been Fired

While Dale's interpersonal skills left much to be desired, the totality of the evidence persuades me that his repeated complaints about safety-related defects in the truck were not well received by management. Their initial response was to promise repairs, but follow-through was never forthcoming. Lambes agreed to fix the truck after a flat tire put it out of service in early December, 2001. He testified he later decided repairs were not needed. Yet, he offered into evidence receipts for repairs completed in early January, 2002, suggesting that defects were cured. RX 1. Dale continued to complain, however, and the evidence indicates his complaints were not wholly devoid of merit.

The record shows that Dale's safety-related complaints about the truck's tires were, despite the alleged repair receipts, corroborated by a Hinckley police officer on January 13, 2002. CX 1. In addition, although Lambes denied at the hearing that the truck had overhead clearance lights, Dale's insistence that it had inoperative overhead clearance lights was confirmed in a Commercial Driver/Vehicle Inspection Report dated March 13, 2002, signed by Lambes himself. CX. 5. As such, Lambes's testimony, alternatively and inconsistently insisting that the truck needed no repairs, that it would be repaired, and that it was repaired, was not credible, especially in light of the police report and Driver Inspection Report indicating that the truck was defective and had not been repaired.

Furthermore, while Lambes seemed inclined to dismiss Dale's complaints as a mere annoyance prior to January 13, 2002, matters escalated on that date. Dissatisfied that his concerns were not heeded by management, Dale contacted the local police. In response, an officer was dispatched to Step 1's premises, and his inspection, as noted above, confirmed Dale's assessment that a front tire of the truck

needed replacement. The next day, Dale imparted this information to Lambes who responded in anger.

Lambes acknowledged that he was annoyed that the truck had been inspected on his premises without his permission, but it also appears that he was angry that Dale brought in the local police as leverage to push for repairs that he deemed unnecessary. Displeased and apparently still seething, Lambes on January 17, 2002, told Dale that the truck was scheduled for repairs even as he prepared to discharge him. By Monday morning January 21, 2002, Dale's fate at Step1 was already sealed when he delivered his letter to Lambes.

To be sure, Dale's attitude and his language around the shop was offensive, but I conclude, for all of the foregoing reasons, that had Dale not engaged in protected activity he would not have been terminated. The "straw that broke the camel's back" was not when Dale left work on January 21, 2002, it was his repeated, persistent complaints about the truck's safety defects culminating in his call to the local police complaining that his ride at Step1 was unsafe.

From all that appears in this record, the Employer's motivations for firing Dale were inextricably intertwined with his protected activity, and the Employer has failed to demonstrate that Dale's transgressions would have caused his termination in the absence of his protected activity. *See*, Passaic Valley, *supra*. To the contrary, I find, on the evidence adduced in this record, that but for his protected activity, Dale would not have been fired.

Relief

In general, an employee suffering dismissal in violation of the act is entitled reinstatement with back pay and other relief which renders him whole. In this proceeding, Dale does not seek reinstatement, but he expects damages because he was out of work for 5 ½ months and lost income during that period at a rate of $12.50 per hour, 40 hours per week. As a prerequisite to the entry of an award for economic damages in these types of cases, however, a complainant usually must demonstrate some effort to mitigate his losses. *See*, Latorre v. Coriell Institute, 97 ERA 46 (ALJ 12/3/97); Doyle v. Hydro Nuclear Services, 89 ERA 22 (ARB, 9/6/96); West v.Systems Applications International, 95 CAA 15 (Sec., 4/1/95). The record shows that Dale eventually secured other employment, but it fails to show when he initiated his job search or the leads, if any, he pursued before he

landed his present job. Under such circumstances, an award of back pay for the full period Dale was out of work is not justified.

The record also shows, however, that his termination was abrupt, and a termination letter which Lambes advised him would be forthcoming apparently was never sent. While the dislocation and disruption of an adverse personnel action imposed in violation of the Act warrants a reasonable period of adjustment by the injured worker, the Employer's failure, in this instance, to follow through with what would appear to be the final formal notice of termination otherwise tends to justify a lag in the initiation of Dale's attempt to mitigate damages.

Considering all of the foregoing circumstances, including the time Dale was out of work, his hourly wage at Step1, and his current earnings, I conclude that an award in the amount of $4080, representing the loss of eight weeks of wages due to the improper discharge, reasonably compensates Dale for the damages he sustained in the absence of evidence that he attempted to mitigate his losses thereafter. Busch v. Burke, 649 F.2d 509, 519 (7th Cir., 1981) cert. denied, 454 U.S. 817 (1981); DeFord, supra; Doyle v. Hydro Nuclear Services, supra; Mosbaugh v. Georgia Power Co., 91 ERA 1 (Sec. 11/20/95); Thomas v. Arizona Public Services Co., 89 ERA 19 (Sec. 9/17/93); Blackburn v. Reich, 982 F.2d 125 (4th Cir., 1992); Creekmore v. ABD Power Systems Energy Co., 93 ERA 24 (Sec. 2/14/96); Lederhaus v. Donald Paschen, 91 ERA 13 (Sec. 10/26/92). More would be unjust, less would be unfair. Complainant's counsel may petition for fees and costs at her convenience. An appropriate order follows. Accordingly;

ORDER

IT IS ORDERED that Step 1 Stairworks pay to Stephen Dale the sum of $4080.00 in damages caused by an adverse personnel action imposed against him in violation of the Act.

A

Stuart A. Levin
Administrative Law Judge